BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 16791
[Redacted].,	)	
	)	DECISION
Petitioner.	)	
	)	

On March 28, 2002, the [Redacted]. (taxpayer) requested a sales tax refund of $150,313.15 that was denied by the Idaho State Tax Commission (Commission) on June 25, 2002. The taxpayer filed a timely protest of the refund denial on August 13, 2002 and a hearing was held on December 11, 2002. The Commission has reviewed the file, is advised of its contents, and hereby issues its decision affirming the denial of the refund determination.

DISCUSSION OF FACTS

The taxpayer operates a private golf course, collects a five percent (5%) sales tax on every golf club membership from a new "equity member" and remits it to the Commission. In its protest letter and hearing, the taxpayer contends that the state sales and use tax statute has no provision for a tax on intangible personal property or on the purchase of real property, including improvements to real property. The taxpayer contends that "equity membership" fees are for real property ownership, management, and voting rights, rather than for the use or privilege of using facilities for a recreational purpose. The taxpayer requests that the Commission refund the tax remitted on "equity memberships" to the club, which the club will return to the members who paid it.

The taxpayer corporation provides, as its primary purpose, a private golf club for members and their guests. Organized as a nonprofit organization, it "does not contemplate pecuniary gain or profit, incidental or otherwise, to its members." *(Articles of Incorporation, Article 4, Purpose and Powers, p. 1).*

Drawing from the *By-Laws, Article III, Membership; Article IV, Meeting of Members;* and, *Article X, Membership Fees and Other Charges*, (as of April 26, 1999) the pertinent facts as to memberships are as follows. There are six membership types. Founder Members formed the corporation and this level of membership is now closed. These are the only golf club members who do not pay periodic fees, dues or charges of any type. They have voting rights. Upon resignation of a Founder, the membership converts to a Golf Membership, described below, and can be subsequently resold by the corporation as such.

Charter Memberships are available to home site owners within a specified community where the golf facility exists. Charter membership is described as a proprietary membership with voting rights.

Golf Memberships appear identical to Charter Membership with respect to playing privileges, but there is no home site ownership. It, too, is described as a proprietary membership with voting rights. Founder, Charter, and Golf Members are entitled to one equal vote per membership.

Golf Social Memberships are proprietary memberships with voting rights equal to two-thirds of memberships previously described. Playing privileges with respect to time are restricted relative to those memberships previously described.

Social Memberships allow for use of tennis facilities, a pool, and the clubhouse. They have no voting rights, and golf privileges are extended to them only as guests of members. Junior Memberships are defined as non-voting and non-proprietary, conveying golf-playing privileges on the basis accorded to Golf Social Members.

Admission of new members is at the discretion of the club's Membership Committee. Membership is conveyed from the existing unsold memberships and from the pool created by

resigning members. Resigning members are not allowed to sell their membership to their successors and the club is not obligated to repurchase memberships if there is no prospective member who qualifies. Therefore, a member who resigns must give notice to the club that the membership is available for repurchase by the club, and the membership becomes part of a waiting list.

According to the taxpayer's By-Laws, Article III, Section 7(c), the club decides the repurchase price (called an initiation fee) to be charged for a particular class of membership. However, in an Addendum to the By-Laws (Para 2 and 7, September 4, 2001), while the members "shall set forth the price" the Board retains authority to establish a fixed price, minimum, maximum or range, at any time it desires.

The resigning member receives 80% of the amount paid by the successor member, less any amount required from that initiation fee to cover unpaid periodic dues or special assessments. Remaining funds (20%) are called transfer fees and become the property of the club. A resigning member continues to maintain all privileges and is liable for all dues until such time as the club repurchases the membership.

The club's board may allow any member to have an inactive status if it determines that a hardship exists. Inactive members must pay one-half the required periodic dues and must relinquish their use of the facilities as well as their right to vote.

Memberships can be converted to other categories pending availability. If a member moves to a higher classification, the difference in prevailing initiation fees is due. If the member moves to a lower classification, no return of the difference in initiation fees is allowed.

On its Sales Tax Refund Claim form, the taxpayer requested a return of "Sales tax remitted on the sale of equity memberships . . ." (Signed and dated March 28, 2002). In the documentation accompanying the refund request and at the hearing held with the Commission, the taxpayer

presented a case for the sale of memberships (i.e., charging an initiation fees) as not taxable. In the taxpayer's opinion the initiation fee is an equity interest or paid-in capital that is not tendered for the use or privilege of using the recreational facility. It is rather to acquire "a proportional ownership interest in the corporation" (*Description of Refund Claimed*, p. 3) or an "equitable interest in the assets" (*Supra*, p. 2). Taxable amounts for the privilege of playing golf, the taxpayer says, are the periodic dues required of each member based on the membership classification, plus the 20% transfer fee paid by the successor member and retained by the club.

ANALYSIS AND CONCLUSIONS

Idaho Code §63-3612, excerpted in pertinent part, defines "sale" for the purpose of sales tax:

> (1) The term "sale" means any transfer of title, exchange or barter, conditional or otherwise, of tangible personal property for a consideration and shall include any similar transfer of possession found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, exchange or barter.
> (2) "Sale" shall also include the following transactions when a consideration is transferred, exchanged or bartered: . . .
> (f) The use of or the privilege of using tangible personal property or facilities for recreation. *(Idaho Code §63-3612)*

The Commission relies on Idaho Code §63-3612(2)(f) to uphold the taxation of greens fees, as well as charges for the use or the privilege of using other recreational facilities. The taxpayer states that the Idaho Sales Tax Code does not define the "use of or the privilege of using" within Idaho Code §63-3612(2)(f) and that it does not specifically tax paid-in capital.

As to the first point, the Idaho Supreme Court found no ambiguity in applying Idaho Code §63-3612(2)(f) to the taxability of golf club initiation fees (as well as to membership dues and assessments) charged by [Redacted] to its members,

> . . . despite [Redacted] contention that they were used wholly for the purpose of paying operating and overhead costs, and though they were payable regardless of whether member actually used the

> facilities. [Redacted] *v. Idaho State Tax Commission*, 122 Idaho, 880 and 841 P.2d 410 (1992).

Although [Redacted] did not characterize any of its membership charges as "equity interest" or "paid-in capital" as does the present taxpayer, the Supreme Court decision still provides considerable guidance. While the present taxpayer draws the Commission's attention to the initiation fees and the characteristics they share with equity interest and paid-in capital, the Idaho Supreme Court in agreeing with the district court's analysis said,

> …under the plain language of the statute the relevant inquiry in determining the taxability of the event is the quid pro quo between the remitter and the recipient, not the ultimate use to which the recipient applies the receipts. *(Supra, 881)*

In the hearing before the Commission, the present taxpayer believes that the portion of the initiation fee charged for a resold membership and returned to the resigning member (80% of the total) should be a nontaxable return of equity or paid-in capital. The remaining 20%, referred to as the transfer fee, should be regarded as a taxable charge for the use or privilege of using the recreational facility. Depending upon market forces, the resigning member could gain or lose money from his initial outlay.

While the possibilities of a gain on an investment seem to strengthen the taxpayer's contention that the initiation fee is primarily an equity investment, the Commission notes as stated previously that the club is organized as a nonprofit corporation with no intention that fees be an investment in contemplation of a future gain. By all outward appearances, the initiation fee is a mandatory prerequisite payment for periodic recreation.

The Commission notes the arbitrariness of the taxpayer's segregation of costs into nontaxable and taxable elements. On what basis does the taxpayer conclude that 20% of the

repurchase price is for the taxable use and privilege of using the golf course? The basis is artificial in that this is the amount retained by the club.

The Commission's attention returns, then, to the 80% figure and what that amount represents to the taxpayer. As noted earlier, the taxpayer defines it as a return of equity or paid-in capital. Asked in the hearing what an "equity interest" in the club provides to the member, the taxpayer responded that it was "voting and management rights." The Commission notes here that the taxpayer's defense of its refund claim has changed over time. In the earliest documentation requesting a refund (*Membership Sale History,* accompanying the *Refund Claim* dated 3/28/02), the return of the entire tax (100% of tax on the initiation fee) was requested, and the request included a return of tax on Social Memberships that do not by definition carry voting or management rights.

Based on the documentation provided by the taxpayer showing the sales prices, some of which are in excess of $110,000, the Commission questions whether someone would pay $88,000 ($110,000 x .80) to vote on management issues and $22,000 ($110,000 x .20) for the use or the privilege of using the golf facilities. In addition, the "management" and "playing golf" portions of the sales price cannot be purchased separately. Can a prospective member pay only the $88,000 to vote and manage? Can a prospective member pay only $22,000 to play golf? The answer to both of these questions asked at the hearing is "no." Thus, the Commission questions whether the total price of membership can be allocated between taxable and nontaxable amounts, as the taxpayer desires. The Commission concludes that the entire price is a precondition for using or the privilege of using the facility for the purpose of recreation and points out that there is no statutory basis for apportioning the sales price.

The Commission notes that having what the taxpayer defines as an "equity interest" in the club provides no assurance by itself of management or voting rights. A member (who by definition

has paid an initiation fee) may lose voting rights for the non-payment of periodic dues as a result of suspension by the Board, or by choosing a time-limited inactive membership status. *(By-Laws, Article IV, Section 6).* Further, as mentioned previously, a member who transfers to a lesser (and less expensive) membership category receives no partial return of his original "equity investment" but may lose voting rights by selecting a membership type that has none.

In advancing its claim, the taxpayer brought a [Redacted] state "Request for Internal Advisory Opinion" to the Commission's attention at the hearing. In this request letter, a person or company working on an agreement draft to settle sales tax disputes with certain country clubs asked the Utah Tax Commission:

> Would the sale of an equity membership which does not give the member voting rights affecting establishing of dues be taxable as an admission or user fee? In the alternative, would the sale of the equity membership (an upfront fee of perhaps $20,000) be considered a nontaxable sale of a share of the club's assets (real, personal, intangible) and assumption of the club's obligations, etc? *(Request Letter to the* [Redacted] *State Tax Commission dated October 20, 1997. WWW.tax.utah.gov/research/rulings/1997/97-069.htm)*

In its response letter, termed an Advisory Opinion, a Utah State Tax Commissioner wrote,

> Nontaxable memberships may be evidenced by either of the following factors:
>
> 1. The club has an organizational structure under which the membership shares internal operational control of the club, as demonstrated by membership participation in operational decisions, such as selecting officers and committees; setting club dues; or controlling social, athletic, recreational and other club activities.
>
> 2. Members own a proprietary interest (equity) in the club or its facilities or other assets.
>
> Your draft agreement attempts to distinguish between taxable and nontaxable membership charges on the basis of voting rights. We suggest that you craft the language to reflect the distinction as it is

> drawn in this opinion. *(Response Letter from the* [Redacted] *State Tax Commission dated October 20, 1997. WWW.tax.*[Redacted]*.gov/research/rulings/1997/97-069.htm)*

The Idaho State Tax Commission takes note of this [Redacted] Advisory Opinion with two qualifications. First, the weight of an Advisory Opinion of another state against a decision of the Idaho Supreme Court lacks persuasiveness. Second, the [Redacted] state tax code has a statutory exemption from taxes on dues paid for a proprietary equity interest. Idaho does not. Based on [Redacted] *Country Club v. Idaho State Tax Commission* 122 Idaho, 880 and 841 P.2d 410 (1992), a tax on dues and fees is predicated on the *quid pro quo* cited previously. As long as the member receives playing privileges, the fees are subject to tax. What that fee eventually is used for is immaterial to the discussion of taxability. Finally, the Commission notes that the taxpayer's By-Laws provide that an expelled member is not entitled to the return of any initiation fees or dues *(Article III, Section 6).* In this respect, and in others mentioned earlier, the initiation fee does not mimic an equity interest.

In the Court of Appeals in Oklahoma, the Southern Hills Country Club sought a refund for sales tax assessed on the club's receipt from stock sales and stock transfer fees. The club argued that the sale and transfer of stock is an investment in and a payment for ownership interest, similar to the present taxpayer's contention. The court upheld the state's taxing authority stating:

> The *(Oklahoma Tax)* Commission's rationale for assessing sales tax on these transactions is that payment for the stock and payment of the transfer fee are prerequisites to use of Southern Hill's facilities. *Sales Tax Claim for Refund of Southern Hills Country Club. Southern Hills Country Club v. Oklahoma Tax Commission,* 1991 OK VIV APP 102, 830 P.2d 196 (1991).

The Supreme Court of Tennessee ruled on a case similar to the present. In that case, a golf club required members to make an initiation deposit for the purpose of capital improvements. The deposit was either refundable in 30 years or a specified sum thereof was returned if the membership

was re-assigned before the expiration of the 30-year term. While a chancery court found the amounts nontaxable as loans,

> We have instead determined that the 'initiation deposits' are taxable…as sales at retail of dues or fees for membership *Nashville Golf & Athletic Club v. Joe B. Huddleston, Commissioner of Revenue, State of Tennessee* (1992).

In July of 1985, the state of Tennessee made a statute change to exempt membership assessments for the purpose of capital improvements *(Tennessee Code Ann. § 67-6-330(a)(14)).*

The Supreme Court of Ohio consolidated four sales tax cases for review on a common question of law. Four country clubs disputed the applicability of sales tax to transactions with its members. Two clubs required members to pay an initiation deposit treated as an interest-free 30-year loan. The remaining two clubs offered memberships that are similar to the present case where, upon resignation, the membership was resold to the club. After reissuing the membership, the resigning member received from his club a sum at least equal to his original membership contribution. In its analysis toward reaching the decision for the consolidated cases, the court said,

> Although the clubs involved here label the required payments as loans or equity transactions, these labels serve only to disguise their true nature as fees or dues that are similar to an initiation fee. An initiation fee, while not defined in the statute, in everyday application involves a payment as a condition precedent to becoming a member of an organization. The transactions at issue here serve the same function. At none of the four country clubs may an applicant become a member until he or she makes the required payment, and the right to use club facilities inures as a result of these transactions. Therefore, classification of these payments as anything other than transactions made to gain membership is nothing more than an attempted end run around the sales tax. *Akron Management Corporation, et. al., v. Zaino, Tax Commr.*, 94 Ohio St.3d 101, 760 N.E.2d 405 (2002)

Here, the entire purchase price must be paid before a member enjoys the use or the privilege of using club facilities. The entire amount of the purchase price is, therefore, taxable.

WHEREFORE, the Notice of Deficiency Determination Refund Denial dated June 25, 2002, is hereby APPROVED, AFFIRMED and MADE FINAL.

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this ____ day of _____, 2003.

IDAHO STATE TAX COMMISSION

_____
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

_____